1982 September 6

[A. LOIZOU, SAVVIDES AND STYLIANIDES, JJ.]

ANDREAS CHARALAMBOUS,

Appellant-Plaintiff,

v.

METALCO LTD.,

Respondents-Defendants.

(*Civil Appeal No.* 6217).

Negligence—Master and servant—Safe system of work—Piece of zinc detached and injuring labourer's eye whilst engaged in cutting a zinc sheet with the help of a cutter and a hammer—Labourer supplied with protective goggles but failing to wear them—Method used by labourer well known to him, the best one in the circumstances of the case and quite safe provided that he used his protective goggles—Labourer the most competent person to decide how to do the work and what tools to use—Failure of employer: to supply him with a pair of scissors in order to do the work does not render them liable for the accident—They were under no duty to supervise his work in order to ensure that he could not do anything which he well knew might be unsafe—Bux *v.* Slough Metals Ltd. [1974] 1 *All E.R.* 262 *distinguished.*

Civil Procedure—Practice—Pleadings—Averments on which a party will rely at the trial must be set out in the pleadings.

The appellant has been in the employment of the respondents for 18 years as an expert in the construction of metallic doors. On May 4, 1978 he proceeded from the workshop of the respondents carrying with him the necessary tools and materials for the purpose of fixing some doors at a construction work undertaken by the respondents. In fixing the doors it was necessary for him to cut small pieces of zinc from a zinc sheet. He placed the zinc sheet on iron bars at a height of 16" and with the help of a cutter and a hammer he was engaged in cutting small pieces of zinc; whilst so doing, a piece of zinc flew into his right eye and injured it.

It was an undisputed fact that the respondents had provid d him with goggles to use when engaged in his work, which he was not wearing at the material time. He neither made use of another pair of goggles of his own, which, for reasons of his own, he preferred to those supplied by the respondents. The explanation he gave for not wearing his protective goggles was because, as he said, "he was working in the sunshine and the sun would reflect into his goggles if he continued to wear them". When asked why he did not move to a place where there was no sun so as to reflect into his goggles, the plaintiff stated that "he had no time to do so as he was in a hurry to carry out the work".

In an action against the employers for damages the trial Court, after finding that the appellant was an expert in the field of his employment and it was upon him to decide what tools he should use and decide how to do a particular work, concluded that the cause of the injury could be attributed to the failure of the appellant to wear either the goggles provided by his employers or even his own goggles and dismissed the action. Hence this appeal.

Counsel for the appellant mainly contended that the respondents failed to discharge their duty, imposed upon them both under the common Law and the statute, to provide a safe system of work and proper supervision. Appellant was not complaining against any failure of the respondents in connection with the goggles but his only complaint was for the failure of the respondents to supply him with a pair of cutting scissors which if used would not have brought about his misfortune. As to this complaint, which he advanced at the hearing, there was no allegation in the particulars set out in the statement of claim that the system of work was not safe.

In support of his contention counsel relied on the case of *Bux* v. *Slough Metals Ltd.* [1974] 1 All E.R. 262, in which an accident occurred as a result of the failure of a workman to wear goggles and though it was found that there was no breach of statutory duty, nevertheless the defendants were found guilty of negligence for breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision.

Held, that from the totality of the material this Court finds

itself in agreement with the finding of the trial Court that the cause of the injury can be attributed to the failure of the appellant to wear his protective goggles; that the non-provision of a pair of scissors was not expressly relied upon in the statement of claim, and it cannot be said that it falls by implication within such pleadings; that from the totality of the evidence, however it appears that the absence of a pair of scissors does not throw the blame of the accident on the shoulders of the respondents, because the method used by the appellant to cut thin sheets of metal with a cutter and a hammer, a method well known to him and occasionally employed by him in the factory and which, according to the evidence adduced by the respondents was the best one in the circumstances of the case and quite safe provided that the appellant used his protective goggles; that in the circumstances of the case and in the light of the experience of the appellant and the fact that he was the most competent person to decide how to do the work and what tools to use, expecting no instructions or supervision in such respect by anyone, it could not be said that the respondents had a duty to supervise his work in order to ensure that he could not do anything which he well knew might be unsafe (*Bux* case, supra, distinguished); accordingly the appeal must fail.

Appeal dismissed.

Cases referred to:

Bux v. *Slough Metals Ltd.* [1974] 1 All E.R. 262;

Kakou v. *Adriatica and another* (1980) 1 C.L.R. 357;

Perentis v. *General Constructions* (1981) 1 C.L.R. 1;

Kyriacou v. *Eliades Ltd.* (1981) 1 C.L.R. 373;

Speed v. *Thomas Swift & Co. Ltd.* [1943] 1 All E.R. 539;

Courtis v. *Iasonides* (1970) 1 C.L.R. 180 at pp. 182, 183;

Mahattou v. *Viceroy Shipping* (1979) 1 C.L.R. 542;

Federated Agencies v. *Tsikkos* (1979) 1 C.L.R. 134;

Norris v. *Syndic Manufacturing Ltd.* [1952] 1 All E.R. 935 at p. 940;

Winter v. *Cardiff Rural District Council* [1950] 1 All E.R. 819;

Panayi v. *Georghios Galatariotis and Sons Ltd.* (1971) 1 C.L.R. 416 at p. 418.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (HjiConstantinou and Nikitas, S.D.JJ.) dated the 19th December, 1980, (Action No. 544/79) whereby his action for damages for personal injuries suffered by him in the course of his employment as a result of the alleged negligence and/or breach of statutory duty of the defendants was dismissed.

C. Hadjiioannou, for the appellant.

A. Dikigoropoulos, for the respondents.

Cur. adv. vult.

A. LOIZOU J.: The judgment of this Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal from the judgment of the Full District Court of Nicosia whereby appellant's action for damages for personal injuries suffered by him in the course of his employment as a result of the alleged negligence and/or breach of statutory duty by the defendants was dismissed.

The accident which resulted to appellant's injury, occurred whilst the appellant in the course of his employment was cutting a zinc sheet when a small piece of zinc was detached and flew into his right eye and injured same.

The circumstances as to how the accident occurred as found by the trial Court on the evidence before it and which are warranted by such evidence, are as follows:

The appellant is 57 years old and had been in the employment of the respondents since 1960, that is, for 18 years prior to the date of the accident as an expert in the construction of metallic doors. On 4.5.1978 he proceeded from the workshop of the respondents to the grounds of the International State Fair carrying with him the necessary tools and materials for the purpose of fixing some doors on a kiosk, as the respondents had undertaken certain construction work at the International State Fair. In fixing the doors it was found necessary for the appellant to cut small pieces of zinc from a zinc sheet in order to use such pieces for closing certain holes. Thus, he placed the zinc sheet on iron bars at a height of 16" inches and with the help of a cutter and a hammer he was engaged in cutting small pieces of zinc;

whilst so doing, a piece of zinc flew into his right eye causing him the injury complained of.

It is an undisputed fact that the respondents had provided him with goggles to use when engaged in his work which he was not wearing at the material time. He neither made use of another pair of goggles of his own, which, for reasons of his own, he preferred to those supplied by the respondents. The explanation he gave for not wearing his protective goggles as appearing in the judgment of the trial Court, was because, "as he said, he was working in the sunshine and the sun would reflect into his goggles if he continued to wear them". When asked why he did not move to a place where there was no sun so as to reflect into his goggles, the plaintiff stated that "he had no time to do so as he was in a hurry to carry out the work".

The appellant, according to his evidence and that of his witnesses, was an expert in the field of his employment and it was upon him to decide what tools he should use and decide how to do a particular work. The trial Court in making its findings on this point, had this to say in its judgment:

> "He further stated that it was he, alone, who decided which tools and instruments he should use and he should take with him from the factory. He accused his employers for failing to provide him with a pair of scissors for cutting zinc which was not even available at the workshop so that he could take it with him at the place of work, and which, as he explained, could be used on a working bench. He said that a big electrical pair of scissors was available in the workshop but this could not be carried to other places of work.
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> Plaintiff's witness No. 2 stated that the plaintiff was not working at the material time under the supervision of anybody. The evidence of this witness supports the evidence of the plaintiff and adds that the plaintiff was the expert in his field in the employment of the defendants. He also adds that the plaintiff was receiving instructions what to do but it was up to the plaintiff himself to decide how to do the work and what instruments to use.
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> P.W.3 was a supervisor in the employment of the defend-

ants. He was not at the material time supervising the work of the plaintiff; he would only check and be responsible for the quality of the work done by the plaintiff but it was the plaintiff who was the expert and was the one to decide how to do the work properly and in the present case how to cut the zinc pieces. When asked if he would provide the plaintiff with a pair of scissors had he been asked by the plaintiff, he replied in the affirmative, adding that he could not have foreseen the need for such pair of scissors in view of the fact that the plaintiff was the expert, as aforesaid. When asked whether such pair of scissors was available in the store of the defendants he replied that he was not aware.

There is no evidence to the effect that, had such pair of scissors been available and been used by the plaintiff at the material time the accident would not have occurred. On the other hand, had the plaintiff been using either his employers' or his own goggles at the material time, we would reasonably expect that the piece of zinc would have been prevented from flying into his eye. We give no weight to the plaintiff's allegation that, if he was wearing his goggles at the material time there was a risk of the piece of zinc hitting on to them, breaking them, and causing more serious injuries to his eye. On the contrary, we find that the cause of the injury can be attributed to the failure of the plaintiff to wear either the goggles provided by his employers or even his own goggles".

Learned counsel for the appellant in arguing his grounds of appeal against the findings of the trial Court submitted that the finding of the trial Court that appellant was an expert in his field was not warranted by the evidence before it. He contended that appellant was merely a skilled metal worker and this fact did not discharge the respondents of their duty to provide a safe system of work and proper supervision and that in the present case they failed to discharge such duty which was imposed upon them both under the Common Law and the Statute.

In support of his argument counsel for appellant made reference, amongst others, to the case of *Bux* v. *Slough Metals Ltd.* [1974] 1 All E.R. 262, in which an accident occurred as a

result of the failure of a workman to wear goggles and though it was found that there was no breach of statutory duty, nevertheless the defendants were found guilty of negligence for breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision.

The duty of the master towards his servants to provide a safe system of work, finds its roots deep into the Common Law. The Common Law has from early times imposed a duty on the master to take fitting care to see that the servants, jointly engaged with him in carrying on his work or industry, shall not suffer injury, either in consequence of his personal negligence, or through his failure properly to superintend and control the undertaking in which he and they are mutually engaged. A breach of this duty causing personal injury has always given the servant a right of action for reparation. For his own personal negligence a master was always liable, and still is liable, at Common Law. (Vide Halsbury's Laws of England, Third Edition, Vol. 25, p. 505, para. 969).

This Court on a number of occasions had the opportunity of reiterating the primary duties owed by a master for the safety of his servants (see the recent cases *Kakou* v. *Adriatica and another* (1980) 1 C.L.R. 357; *Perentis* v. *General Constructions* (1981) 1 C.L.R. 1; and *Kyriacou* v. *Eliades Ltd.* (1981) 1 C.L.R. 373).

In *Kakou* v. *Adriatica and another* (supra) the Court had this to say at p. 367:-

> "The primary duties as to safety owed by a master to his servant have been said to be threefold: (1) To provide a competent staff; (2) to supply adequate materials (such as proper machinery, plant, appliances, etc.); and (3) to institute and maintain a proper and safe supervision where necessary. (*Vide Wilsons & Clyde Coal Co.* v. *English*, [1938] A.C. 57 per Lord Wright at p. 81 and per Lord Maugham at p. 86). To these must be added the obligation to observe all statutory regulations enacted for the workman's safety.
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> 'It is no doubt convenient', said *Parker L.J. in Wilson* v. *Tyneside Window Cleaning Co.* [1958] 2 All E.R. 265

'to divide that duty into a number of categories; but for myself, I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in *Smith* v. *Baker & Sons*, [1891] A.C. 325, to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk' ".

A system of working may consist of a number of elements and what exactly it must include will depend entirely on the facts of the particular case (see *Speed* v. *Thomas Swift & Co. Ltd.* [1943] 1 All E.R. 539).

In *Perentis* v. *General Constructions* (supra) the Court said at pp. 11, 12, 13:

"Before proceeding any further we wish to quote also the passage from the judgment of Lord Oaksey in the case of *Winter* v. *Cardiff R.D.C.* [1950] 1 All E.R., p. 819—quoted also by the trial Court—with regard to the question of the safe system of work, where at pp. 822 and 823 he had this to say:

'In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of these circumstances is that he is an employer of labour and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate precautions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foreman and workman must exercise theirs. It is not easy to define these spheres but where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing difficult functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, when the operation is simple and the decision how

it shall be done, has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workman on the spot'.

On the aforesaid pronouncements and on the facts of the case, we agree with the trial Court that the respondents employers had discharged their duty as masters to take reasonable care for the safety of their workmen. The method with which the scaffold had to be carried was reasonable and comprehensible and the plaintiff himself was the senior employee of those involved in the operation and to whom the instructions of the foreman had been given. A sufficient number of persons was assigned to the job which was not dangerous if carried horizontally in accordance with the instructions and this is not a question of law at all, but a question of fact and as Lord Denning put it in the case of *Qualcast (Wolverhampton) Ltd.*, v. *Haynes* [1959] 2 All E.R., p. 38, at pp. 44 and 45:

' ... What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it, the tribunal of fact—be it judge or jury—can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law'.

The trial Court further examined, of course, in relation to this issue the question whether the foreman ought to have stayed there in order to make certain that his instructions were executed strictly and to supervise the whole operation and it came to the conclusion that the respondents have not failed through their foreman in the discharge of their duties towards their employee inasmuch as the appellant himself not only he was one of the senior employees involved in the operation but also was related to the foreman, a fact from which it might safely be inferred that the foreman had good grounds outside the professional

field for trusting the judgment and reliability of the appellant. Moreover, the foreman had seen to the carrying out of the preparatory work and having given good, sound, workable and reasonable instructions to a competent senior employee for a job quite simple in nature and quite safe in execution, provided, of course, the instructions given were followed and very rightly the trial Court found that further supervision by him was unnecessary and that what the appellant and the other labourers in that group did, could not be foreseeable by any reasonable person".

It has been contended by counsel for the appellant that appellant was not an expert as found by the trial Court but merely a skilled metal worker. We find ourselves unable to agree with such contention. The finding of the trial Court in this respect is amply warranted by the evidence before it. As to the experience of the appellant, the mode he was carrying out his work on the day when the accident occurred and the devices provided by the respondents to enable him carry out his work, the following appear in the record of the proceedings before the trial Court, which is before us.

In Plaintiff's evidence:

"Q. Since 1960 did anybody instruct you?

A. No because having worked for too many years I had experience and this was a special case".

On being asked as to whether, when a welding work was necessary he was the person to decide as to how the work was to be done his answer was "I am the one to decide"; and on the question of the necessary tools to be used for such work his answer was to the same effect "I decide".

As to the part the foreman had to play, he agreed that the foreman did not have to tell him what to do and how to do it as he himself had to decide how the work was to be done. He also admitted in his evidence that he had been supplied with protective goggles which he normally used to wear, but on the day when the accident occurred he was not wearing them. When asked as to whether his employers had failed to do anything which they had to do in connection with the goggles, his answer was in the negative saying that his complaint was

not about the goggles but because of the failure to provide him with a pair of cutting scissors and so he had to cut the zinc sheets with a cutter and a hammer. He admitted, however, that even when working in the factory, the method employed for cutting thin pieces of metal was by using a cutter and a hammer but in such cases the metal sheet was placed on a wood bench about 3 feet high. The respondents in fact, at their factory, had a pair of electric scissors which was being used for cutting metals, but such scissors were weighing 8-10 tons and could not be used for out of doors work.

Appellant's witness 3, a technical assistant of the respondents in charge of metallic constructions said in his evidence:

"Q. Did you give them any instructions as to the construction of the door?

A. No. Andreas Charalambous (the appellant) was sent by the Manager to the place of work, to do this work. Of course I was responsible to supervise him and supply him with anything required by him

Q. If Mr. Charalambous had told you, before leaving the factory that a pair of cutting scissors was necessary would you have supplied him?

A. Of course I would not have refused. It was not something that could be foreseen and that its use was necessary for cutting this type of metal sheet

Q. On the day when the accident occurred who was the person to decide how the metal sheet was to be cut?

A. Naturally the person who was going to cut it".

This witness on being asked as to whether appellant requested him to do anything for the carrying out of the work in another manner, he replied in the negative. On the question of protective goggles he said: "He had to use the goggles always. He was always consistent concerning goggles and from what I know he had also a pair of goggles of his own which he was using".

A witness who testified for the respondents, their production manager, said in his evidence that the appellant had participated in a course of lessons for security of workmen which was organised by the Government Productivity Centre. He also said that all workmen employed by the respondents at their factory were supplied with protective equipment which they were instructed to use and whenever anyone failed to use it he was being asked to do so. Referring to the use of goggles by the appellant he said: "Mustakas (a nickname of the appellant) knew that he ought to wear his goggles, something he always did, but on that occasion I do not know if he was wearing them".

He further described the type of goggles supplied to the appellant, which according to his evidence, had glasses specially made to resist a blow on them and in case the blow was a forcible one likely to break them, they smashed into small pieces which could not injure the eye. He also said that the manner in which the work was carried out by the appellant on the day when the accident occurred, that is by cutting a thin piece of zinc sheet with a cutter and a hammer was the best one in the circumstances.

The appellant did not attempt to throw any blame on the respondents for failure to supply him with protective goggles or for not instructing him to wear them. No such allegation appears in the particulars set out in the statement of claim, and in his evidence he said that respondents had not failed to do anything which they had to do in connection with the goggles and that his only complaint was for the failure of the respondents to supply him with a pair of cutting scissors which if used would not have brought about his misfortune. As to this complaint, which he advanced at the hearing, there is no allegation in the particulars set out in the statement of claim that the system of work was not safe. Paragraph 5 of the claim reads as follows:

"5. The system of work would have been safe if:

(i) The zinc sheet should have been placed on a wooden stand or table or bars and the plaintiff to work standing and not by leaning on the ground where the said sheet was.

(ii) There should have been proper supervision by a fore-

man or by other defendants' employee, who would have seen that the necessary instructions as to the safety were given and were followed.

(iii) The workers were instructed:

As to the manner of cutting the zinc so that pieces flying from the sheet would fly away from and not onto them".

It has been stressed time and again that any averments on which a party in the action will seek to rely at his trial must be set out in his pleadings. In *Courtis* v. *Iasonides* (1970) 1 C.L.R. p. 180 Vassiliades P. had this to say as to the object of the pleadings, at pp. 182, 183:

"The pleadings in an action are the foundations of the litigation; they must be carefully prepared as the set of rails upon which the train of the case will run. The Civil Procedure Rules (Or. 19, r.4) are clear on the point; and daily practice lays stress on the need to apply strictly this rule. A case is decided on its pleaded facts to which the law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible in order to give full opportunity to the parties affected by the amendment to meet the new situation; to run their case, so to speak, on the new rails".

(See also, inter alia, *Mahattou* v. *Viceroy Shipping* (1979) 1 C.L.R. 542 and *Federated Agencies* v. *Tsikkos* (1979) 1 C.L.R. 134).

In the present case the allegation of the appellant is that there was both a breach of statutory duty and of the common law duty of care towards employees, due by their employers. We have heard no argument by counsel for the appellant as to the nature of the breach of statutory duty and no particulars of breach of statutory duty are set out in the pleadings. Counsel for the respondents, however, drew our attention to the provisions of sections 58 and 59 of the Factories Law (Cap. 134) and submitted that there was no breach of statutory duty in the present case.

Section 58 provides that in the case of any factory workers

employed in any process involving excessive exposure to wet or any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings shall be provided and maintained for the use of such workers.

Section 59 provides that: "In the case of any such process as may be specified by the Commissioner, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the Commissioner, be provided to protect the eyes of the persons employed in the process".

No evidence has been adduced by the appellant that the respondents were guilty of breach of the statutory duty of care imposed upon them by law, but, on the contrary, from the whole of the evidence including that of the plaintiff himself it is abundantly clear that the respondents fully complied with such duty. Suitable goggles had been provided and the attention of the workers was always drawn to wearing them. The appellant, as we have already mentioned, admitted in his evidence that he had no complaint against the respondents for failure to respond to their duty concerning supply of goggles and instructions to wear them.

In *Norris* v. *Syndic Manufacturing Ltd.* [1952] 1 All E.R. 935 Romer L.J. at p. 940 had these observations to make concerning the duty to provide a safety device:

> "_____ the argument which was advanced before us _ is that an employer does not 'provide' a safety device _____ unless he tells the workmen concerned that they have got to use it. I am unable to find any sufficient warrant for that view. The primary meaning of the word 'provide' is to 'furnish' or 'supply', and, accordingly on the plain, ordinary interpretation of s. 119(1) (of the Factories Act 1937), a workman's statutory obligation is to use safety devices which are furnished or supplied for his use by his employers".

The above observations were adopted by Edmund Davies L.J. in *Bux* v. *Slough Metals Ltd.* (supra) where at pp. 266, 267 had this to say:

"Then, did the defendants 'provide' suitable goggles? But for the ingenious submissions of counsel for the plaintiff, I should have thought that the contrary contention was unarguable. He relies on the facts hitherto summarised as establishing the defendants' complete acquiescence in their die-casters' failure to wear the type 1 goggles supplied, that they were thereby accepting their unsuitability, and that this so frustrated the performance of their statutory duty as to amount to a failure to 'provide'. I content myself with observing that such an approach is quite inconsistent with that adopted by this Court in *Norris* v. *Syndic Manufacturing Co. Ltd.* which I respectfully regard as correctly decided.

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.....

I hold, accordingly, that the defendants here 'provided suitable goggles ..... for persons employed in (i) work at a furnance where there was a risk to the eyes from molten metal' and that the learned judge held they had fulfilled their statutory obligation in this respect".

In *Bux* case (supra) the Court after having found that there was no breach of statutory duty, went on to consider whether such finding exonerated the defendants from any breach of their common law duty. The judgment at pp. 267, 268, reads as follows:

"No authority was cited to us for the proposition that compliance with an employer's statutory requirements per se absolves him from any liability to his employee at common law. On the contrary, there is a solid body of high authority to the contrary effect. For example, in *Franklin* v. *Gramophone Co. Ltd.* this court held that compliance by the occupier of a factory with all statutory requirements will not necessarily absolve him from liability if he has not fulfilled his common law duty of care: and in *Matuszczyk* v. *National Coal Board* it was held that statutory regulations imposing on a shot-firer duties which were also incumbent on him at common law had neither impliedly nor expressly extinguished the latter. Reference should also be made to the observations of Lord Porter and Lord Reid in *National Coal Board* v. *England.* This

is not to say that the scope of statutory regulations is wholly irrelevant to the question of whether there has been a breach of the common law duty; on the contrary, in many cases compliance with the relevant regulations may well be (as Lord Keith of Avonholm said in *Qualkast (Wolverhampton) Ltd.* v. *Haynes*) of 'evidential value'.

I respectfully consider that the correct approach in this matter is that indicated in *Gill* v. *Donald Humberstone & Co. Ltd.* by Lord Reid, who, speaking of the Building (Safety, Health and Welfare) Regulations, 1948 said:

> '_____ I find it necessary to make some general observations about the interpretation of regulations of this kind. They are addressed to practical people skilled in the particular trade or industry, and their primary purpose is to prevent accidents by prescribing appropriate precautions. Any failure to take prescribed precautions is a criminal offence. The right to compensation which arises when an accident is caused by a breach is a secondary matter. The regulations supplement, but in no way supersede, the ordinary common law obligations of an employer to care for the safety of his men, and they ought not to be expected to cover every possible kind of danger' ".

and concludes as follows at pp. 270, 271:

> "The question of whether instruction or persuasion or even insistence in using protective equipment should be resorted to is, therefore, at large, the answer depending on the facts of the particular case. One of the most important of these is the nature and degree of the risk of serious harm resulting if it is not worn. Counsel for the defendants retorts that the plaintiff's own evidence showed that he regarded the risk as obvious and that accordingly no further instruction was called for, any more than, as this court held, it was reasonably to be expected on the facts of *Wilson* v. *Tyneside Window Cleaning Co.* where this court drew a distinction between cases where the risk is obvious and those where it is insidious and hidden. I find it difficult to deal with this aspect of the case without

also considering the question of causation, for counsel for the defendants submits that the plaintiff's failure to use what the judge held to be suitable goggles indicates that the probability is that he would never have worn them, however much the employers tried (at the risk, testified to by the witnesses, of losing all their die-casters) to establish a rule that they must be. He therefore submitted that, even were there any obligation on the employers to exhort the plaintiff to wear his type 1 goggles, the irresistible inference here—as in *Cummings (or McWilliams)* v. *Sir William Arrol & Co. Ltd.*—was that the plaintiff would not have worn them.

I have found these the most difficult aspects of a somewhat troublesome case. But, basing himself on Mr. Bevan's evidence that the prudent employer 'would not do nothing', the learned judge held negligence established. Having seen the type of man the plaintiff is and heard him, and dispite his rejection of the plaintiff's evidence on serveral important points, the judge went on to say:

> 'He was not the type of man who would have disregarded instructions if they were given personally and in a reasonable and firm manner and were followed up by supervision. I think he would have followed instructions and persistent advice. He was in no way a difficult or obstinate person'.

And, as Stamp L.J. pointed out during counsel's submissions, a reminder that all die-casters who disobeyed reg. 13(4) were liable to be prosecuted could have fortified the employers' exhortation most effectively. The learned judge held that the plaintiff had discharged the onus of establishing on the balance of probabilities that he would have worn goggles had the sort of system the judge described been instituted and followed. Whether I should have come to the same conclusion I cannot say, so much depending on the view formed by the court of the particular workman who was the plaintiff. This court is in a far less advantageous position in that respect than was Kerr J. and the conclusion I have come to is that we ought not to disturb his finding that the claim in common law succeeds."

The facts in *Bux* case (supra), however, on which counsel for the appellant sought to rely, are different from the facts in the present case. In *Bux* case the plaintiff was not an expert employee who had to decide how a particular work had to be performed and what was the proper way of performing it, as it is the case with the present appellant. The plaintiff in that case had been trained to do that particular type of work for some weeks prior to the accident whereas in the present case the plaintiff had been trained and was performing his work for 18 years prior to the accident. The plaintiff in *Bux* case though instructed to wear protective glasses he was not using them and the defendants, though aware of the fact that neither plaintiff nor the other employees wore goggles in the course of their work, they failed to explain to them the need for wearing such goggles and persist to compliance, even though, as the trial Judge found, "the management should have been aware of the risk to eyes from the work going on in his foundry." In the present case, there is no allegation of any failure by the respondents to provide protective goggles and of insisting for their use. As mentioned earlier, the plaintiff himself in his evidence admitted that he had no complaint against the respondents in respect of the discharge of their duty concerning the supply and use of the goggles, and the rest of the evidence establishes that the respondents did everything within their duty to supply goggles to the appellant and see that such goggles were being used.

The opinion expressed by Lord Oaksey in *Winter* v. *Cardiff Rural District Council* (supra) as to the common law duty of an employer of labour to act reasonably in all the circumstances to which reference has already been made in *Perentis* v. *General Constructions* (supra), was adopted in *Nicos Panayi* v. *Georghios Galatariotis and Sons Ltd.* (1971) 1 C.L.R. 416 in which the Court had this to say (per Triantafyllides, P.) at p. 418:

> "We are of the view, in the light, inter alia, of the *Winter* case (supra), that as one particular method of cutting the binders was safe and another was not, there ought to have been considered by the trial Court whether or not the accident could be attributed to any failure of the respondents, as employers, to provide a safe system of work. We have examined this issue in determining this appeal and

we are of the opinion that as it had been established by the evidence of the appellant himself that he did know what was the safe method of cutting the binders, namely cutting first the binders which were holding together the arms of U-shaped bar and then proceeding to cut the binders near the U-curve and not in the opposite sequence as the appellant did on the occasion on which he was injured, it is clear that the cause of the accident is not a failure to provide a safe system of work but the fact that such a system, which was known to the appellant, who had six years' experience in work of this kind, was disregarded by him; and we are, also, of the view that in such circumstances it could not be said that the respondents had a duty to supervise the work of the appellant in order to ensure that he could not do what he well knew to be unsafe."

From the totality of the material before us we find ourselves in agreement with the finding of the trial Court that the cause of the injury can be attributed to the failure of the appellant to wear his protective goggles. As to the allegation in the pleadings that the respondents failed to discharge their duty of care because the zinc sheet should have been placed on wooden stand or table or bars so that appellant could work standing and not leaning down, this was a matter which appellant with 18 years experience in this type of work, and the only competent person to decide as to the mode the work was to be carried out and the means to be employed, could himself had arranged. Furthermore, the appellant did not allege in his evidence that working in a leaning position was creating any additional danger than working in a standing position. He did not advance this ground as a ground of negligence by the respondents and as he said in his evidence, his only complaint was because a pair of cutting scissors was not provided. The non-provision of a pair of scissors was not expressly relied upon in the statement of claim, and it cannot be said that it falls by implication within such pleadings. From the totality of the evidence, however, it appears that the absence of a pair of scissors does not throw the blame of the accident on the shoulders of the respondents, because the method used by the appellant to cut thin sheets of metal with a cutter and a hammer, a method well known to him and occasionally employed by him in the factory and which, according to the evidence adduced

by the respondents was the best one in the circumstances of the case and quite safe provided that the appellant used his protective goggles.

In the circumstances of the case and in the light of the experience of the appellant and the fact that he was the most competent person to decide how to do the work and what tools to use, expecting no instructions or supervision in such respect by anyone, it could not be said that the respondents had a duty to supervise his work in order to ensure that he could not do anything which he well knew might be unsafe.

For the foregoing reasons, we have come to the conclusion that this appeal must fail; but in the circumstances of this case, we shall not make any order as to costs in the appeal.

Appeal dismissed. No order as to costs.